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March 17, 2004

Ms. Marlene Dortch, Secretary Federal Communications Commission The Portals, TW-A325 445 12<sup>th</sup> Street SW Washington, DC 20554

Re: Ex Parte Presentation - Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No.s 01-338, 96-98, 98-147

Dear Ms. Dortch:

Pursuant to the Commission's *ex parte* rules, one copy of the attached letter to Commissioner Michael Copps is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor Counsel for EarthLink, Inc.

CC: Commissioner Michael Copps Christopher Libertelli Jessica Rosenworcel Matthew Brill Scott Bergmann Dan Gonzalez 1750 K Street NW Suite 600 Washington, DC 20006

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## Via Electronic Filing & Facsimile

Commissioner Michael J. Copps Federal Communications Commission Eighth Floor 445 12th Street, SW Washington, DC 20554

Re: Ex Parte Presentation - Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No.s 01-338, 96-98, 98-147

EarthLink Petition for Reconsideration regarding Line Sharing UNE

## Dear Commissioner Copps:

In anticipation of our meeting later this week, EarthLink submits this letter to explain its position for reconsideration of the elimination of the line sharing unbundled network element (UNE), especially in light of the D.C. Circuit's recent decision in <u>USTA v. FCC</u>, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) vacating, remanding, and affirming, in part, the *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, <u>Report and Order</u>, 18 FCC Rcd. 16978 (2003) ("<u>Order</u>").

As an initial matter, and we hope you would agree, line sharing has been a remarkable note of competitive success in the arena of "last mile" broadband facilities which are generally characterized by monopoly or, at best, duopoly providers of service. Consistent with the Section 706 broadband deployment goals, line sharing has enabled facilities-based competitive LECs such as Covad to deliver competitive broadband telecommunications services to Internet service providers (ISPs) such as EarthLink which in turn serve hundreds of thousands of end-users. Line sharing is technically feasible and, indeed, makes more efficient use of existing copper loops that consumers have bought and paid for over the years from incumbent LECs. Elimination of line sharing on the "old wire" copper loops strikes a blow to broadband competition.

Further, several developments show that the facts underlying the <u>Order</u>'s line sharing impairment analysis are not as was assumed, warranting reconsideration of the holdings of the <u>Order</u>. First, the impairment analysis of the <u>Order</u> (¶ 258) asserts without substantiation that CLECs could recoup the costs of purchasing a full loop by offering video services. This is demonstrably false. Indeed, the Commission's recent <u>Tenth Video Competition Report</u> (FCC 04-5, ¶ 117) shows that even incumbent LECs generally do not offer video services via copper loops. Rather, BOCs are partnering with satellite television providers to offer video services.

The evidence also shows that line splitting is not an available competitive alternative to line sharing. While the  $\underline{\text{Order}}$  (¶ 259) relied on a single press release as the basis for the viability

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Ex Parte Presentation - CC Docket No.s 01-338, 96-98, 98-147 March 17, 2004 Page 2

of line splitting, the CHOICE Coalition and MCI have since offered detailed evidence in the record that line splitting is not a functional substitute for line sharing, and that the BOCs' OSS for line splitting creates unnecessary costs, delays, administrative burdens, and discriminatory treatment which places CLECs and their end users at a competitive disadvantage vis-à-vis the incumbent LEC. Furthermore, line splitting is limited to only that small portion of the market with local exchange service provisioned by CLECs.

Just as important, the <u>USTA II</u> decision inflicts a possibly fatal blow to line splitting and the competitive opportunity for data and voice CLECs to share the cost of a single loop. Without UNE-P as a viable option, line splitting can no longer bear the weight it was given in the <u>Order</u> (¶ 260) as a long-term competitive alternative to line sharing. Similarly, the balance of line sharing for UNE-P also no longer holds, and the best the Commission should do now is to bring back <u>some certain</u> competition with line sharing regardless of the future decisions that may be rendered by the Supreme Court. We note that while the D.C. Circuit found that the decision to eliminate the line sharing UNE was not arbitrary or capricious, the Commission is not foreclosed from reconsidering this aspect of the <u>Order</u>. Indeed, under Section 405 of the Communications Act, it is the Commission, not the courts, that is responsible for altering an initial decision when, as in this case, additional factual and policy considerations warrant it.

Finally, if the Commission does not reinstate line sharing, it should better protect existing end users in the transition process. Currently, there is no "hot cut" process to transition the hundreds of thousands of end users on line sharing to the incumbent LEC when the CLEC decides to discontinue line-shared DSL. The transitional pricing, therefore, should be held in abeyance until industry develops a manner to transition end users without loss or interruption of DSL service to hundreds of thousands of end users.

We look forward to discussing these issues with you later in the week. In accordance with the Commission's *ex parte* rules, one copy of this letter has been filed electronically in each of the above-referenced dockets.

Sincerely,

/s/

Mark J. O'Connor Counsel for EarthLink, Inc.

CC: Christopher Libertelli Jessica Rosenworcel Scott Bergmann Matthew Brill Dan Gonzalez